No. 86-1659

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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CONTINENTAL CAN COMPANY,

*Petitioner,*

v.

ROBERT GAVALIK, *et al.*,

*Respondents,*

-and-

CONTINENTAL CAN COMPANY, A MEMBER OF THE CONTINENTAL GROUP, INC.

*Petitioner,*

v.

ALBERT JAKUB, *et al.*, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

*Respondents.*

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## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Note: Please see the Petition for a listing of the parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of the petitioner, Continental Can Company.

## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Continental Can Company, petitioner in the above-captioned case, files this supplemental brief to call this Court's attention to a series of recent decisions by this Court which lend support to a number of the positions the company has asserted in its Petition.

### I. Arbitration

The Court's decision in *Shearson/American Express, Inc. v. McMahon*, 55 U.S.L.W. 4757 (U.S. June 8, 1987), strongly supports Continental's position that the claims of the respondents should have been arbitrated. Continental has shown that the proper test to be applied in an international dispute to a statutory right in order to determine whether that right is arbitrable is described in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985) and asserted that the same test is applicable to domestic disputes. In *Shearson/American Express, Inc.*, the Court found in a case involving a domestic dispute that "[a]lthough the holding in *Mitsubishi* was limited to the international context, . . . much of its reasoning is equally applicable here." *Id.* at 4762. The Court applied the *Mitsubishi* test to domestic claims arising under two statutes, the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78a *et seq.*, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, finding that rights under both statutes were arbitrable.

There is also an important implication of the Court's decision in *Shearson/American Express, Inc.* The

Court quotes the arbitration provision at issue at the beginning of its opinion:

> Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules, then in effect, of the National Association of Securities Dealers, Inc. . . .

*Id.* at 4757. This is a broad coverage clause that contains only general language. It contains no specific reference to claims under the Exchange Act or under RICO. Although the Court addressed only one prong of the *Mitsubishi* test in its consideration of these statutes (finding no legislative intent that would preclude arbitration of statutory rights under either of the two), the Court also implied it would be possible for an arbitrator acting under such a provision to consider Exchange Act or RICO claims. If this were not so, the Court presumably would have dismissed the case for lack of coverage as it did in *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972).

The respondents in *Shearson/American Express, Inc.* noted that "the so-called customer agreement containing these standard arbitration clauses is not an agreement as between industry professionals but between brokerage professionals and the ordinary customer with typically no bargaining power as to the contents of the form agreement." Respondents' Brief in Opposition to the Petition for a Writ of Certiorari at 20 (filed August 13, 1986). While making allowance for legitimate advocacy and keeping in mind the fact

that the lower court found that the contract was not a contract of adhesion, it appears the agreement was not one that derived from extensive bargaining between equal parties.

The collective bargaining agreement between the Petitioner and the union representing the Respondents in the present action was, of course, the well-considered result of extended bargaining and negotiation between the two. Because this Court has found by implication that a standard arbitration clause in a commercial agreement covered claims based on the complex technical requirements for a civil RICO claim, it should be even more willing to find that the bargained-for grievance procedure of a collective-bargaining agreement designed to "erect a system of industrial self-government" where "[a]rbitration is the means of solving the unforeseeable" (*USW v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-81 (1960)) encompasses claims based on the relatively straightforward requirements for relief based on the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.* The Court's treatment of arbitrability in *Shearson/American Express, Inc.* makes it clear that ERISA-based claims fall under the coverage of a broad, non-specific, arbitration provision.

The strong support for arbitral remedies evinced by this recent decision makes more compelling the need for this Court to resolve the disagreement among circuits over the question of the arbitrability of rights arising under ERISA.

**II. Statutes of Limitations**

Two other recent Supreme Court decisions, *Agency Holding Corp. v. Malley-Duff and Assocs.*, 55 U.S.L.W.

4952 (U.S. June 22, 1987) and *Goodman v. Lukens Steel Co.*, 55 U.S.L.W. 4881 (U.S. June 19, 1987), vindicate the validity of the legal arguments made by Continental with respect to the statute of limitations (SOL) applicable to claims under Section 510 of ERISA, 29 U.S.C. § 1140: (1) federal analogies are especially appropriate where the claim involves several states; (2) an analogy to federal discrimination claims is a valid alternative, as is the six-month period of the NLRA; (3) state catchall limitation periods do not reflect congressional intent, may not be available, and may frustrate federal policy; (4) a shorter limitation period is retroactively applicable to plaintiffs' claims.

**A. *Agency Holding Corp. v. Malley-Duff and Assocs.***

In *Malley-Duff* the Supreme Court reversed the Third Circuit and applied the four-year period of civil enforcement actions under the Clayton Anti-Trust Act, 15 U.S.C. § 15b, to RICO civil enforcement actions.

The decision is important because it affirms the principle explicated in *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983) that courts may borrow from federal law instead of state law when the federal SOL provides a "closer analogy", and "when the federal policies at stake and the practicalities of litigation" make the federal SOL more appropriate. *Malley-Duff*, 55 U.S.L.W. at 4953, *quoting DelCostello*, 462 U.S. at 172.

In support of a federal SOL, the Court pointed to the interstate nature of RICO claims: "As this case itself illustrates, RICO cases commonly involve interstate transactions, and conceivably the statute of limitations of several States could govern any given RICO claim." *Malley-Duff* at 4955. The Court concluded as follows:

> The multistate nature of RICO indicates the desirability of a uniform federal statute of limitations. With the possibility of multiple state limitations, the use of state statutes would present the danger of forum shopping and, at the very least, would "virtually guarante[e] . . . complex and expensive litigation over what should be a straightforward matter."

*Id.* at 4955, *quoting* the Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law (1985) [hereinafter RICO report] at 392.

The Court's rationale supports Continental's selection of the six-month limitation period of section 10(b) of the National Labor Relations Act (NLRA), as amended, 29 U.S.C. § 160(b), or its alternative selection of the two-year period applied to federal discrimination claims under 42 U.S.C. §§ 1981 and 1983. As Continental stated in its petition, "[t]he lack of direct guidance on a limitations period for ERISA-based claims has resulted in confusion among the courts, considerable opportunity for forum shopping and great uncertainty for private litigants." Petition at 17-18. *See also* Petition at 19-20 and at 22 *and Fort Halifax Packing Co. v. Coyne,* 107 S. Ct. 2211 (June 1, 1987) (emphasizing the need to vigorously apply the ERISA preemption provisions where applying state law would endanger the uniform application of ERISA).

In support of its selection of the four-year period of the Clayton Act in *Malley-Duff*, the Supreme Court referred to similarities between the Clayton Act and

RICO. 55 U.S.L.W. at 4954-55. Similarly, the legislative history of ERISA highlights the similarity between Section 510 actions and charges of unfair labor practices under the NLRA. 119 Cong. Rec. 30,374 (1973), *reprinted in* Senate Comm. on Labor and Public Welfare, Subcomm. on Labor, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974 (Comm. Print 1976) ("Leg. His.") at 1775, and discrimination suits, 119 Cong. Rec. 30,044 (1973), *reprinted in* Leg. His. at 1641. *See* Petition at 18 and 21-22.

*Malley-Duff* is also important because it affirms the Court's rejection of the use of "catchall" limitation periods where it is "unlikely that Congress would have intended such a statute of limitations to apply." *Malley-Duff*, 55 U.S.L.W. at 4955 (citing *Wilson v. Garcia*, 471 U.S. 261, 278 (1985)).

The Court rejected catchall periods in *Wilson v. Garcia*, 471 U.S. at 278, and instead selected the state statute of limitations applicable to personal injury claims. In *Malley-Duff* catchall periods were rejected again. One reason offered by the Court was that not all states have catchall statutes. *Malley-Duff*, 55 U.S.L.W. at 4955 (citing RICO Report at 391). In addition the Court found that while the personal injury period "minimized the risk" that the choice of a state limitation period would not fairly serve the federal interests involved in § 1983 discrimination actions, *id.*, "a similar statement could not be made with confidence about RICO and state statutory 'catch alls' [sic]". *Id.*, *quoting A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 339 (3d Cir. 1986) (Sloviter, J., concurring).

The same reasoning applies to the use of catchall periods in ERISA discrimination actions. Not all states have catchall statutes. Moreover, catchall statutes, because of their length, would not fairly serve the federal interest in rapid resolution of labor conflicts.

**B. *Goodman v. Lukens Steel Company***

In *Wilson v. Garcia*, 471 U.S. 261 (1985), the Supreme Court held that all discrimination actions, under 42 U.S.C. § 1983 regardless of the nature of the underlying wrongs, were subject to the states' statutes of limitations for personal injury actions. *Goodman*, affirming the Third Circuit's opinion, extended this holding to § 1981 discrimination actions.

*Goodman* applied the *Garcia* limitation period to § 1981 claims because both § 1981 and § 1983 are "part of a federal law barring racial discrimination" which is "a fundamental injury to the individual rights of a person". 55 U.S.L.W. at 4882. Application of the same SOL to ERISA discrimination actions is suggested by the legislative history of ERISA, Petition at 21-22, and entirely conforms to the policy of the Supreme Court as explained in *DelCostello* and *Malley-Duff*, to analogize to federal law if federal law provides a closer analogy, and the federal policies at stake and the practicalities of litigation make a federal rule a more appropriate vehicle for interstitial lawmaking.[1]

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[1] Thus, the *Gavalik* decision also appears to be at odds with the Third Circuit's prior opinion in *Goodman v. Lukens*, applying *Garcia* to a § 1981 employment discrimination claim. *But see Gavalik v. Continental Can Co.*, 812 F.2d 834, 845, n.21 (3d Cir. 1987), *petition for cert. filed*, 55 U.S.L.W. 3752 (U.S. April 15, 1987) (Petition at 21a), where the court argues that its prior opinion in *Goodman* highlights the limitations of *Garcia*.

*Goodman*, however, is also significant for its application of the principles established in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *Goodman* affirms the *Chevron* rule that cases "should be decided in accordance with the law existing at the time of decision." 55 USLW at 4882. Nonretroactivity is appropriate only in "certain defined circumstances." *Id.* Thus, a shorter SOL should be applied retroactively unless it overrules clear precedent on which the complaining party was entitled to rely, the purpose of the change in the law would not be served, and retroactive application would be inequitable. *Id.*

Application of the principles enunciated in *Chevron* and *Goodman* compels the retroactive application of a shorter SOL to the *Gavalik* plaintiffs.

Whatever the state of the law with respect to § 1981 or 1983 discrimination actions[2], when plaintiffs

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[2] The Third Circuit applied the *Chevron* test to § 1983 in *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir.), *cert. denied*, 106 S.Ct. 349 (1985). Plaintiff Smith brought his employment discrimination action in March of 1982. The court concluded that in 1982 there was no precedent establishing a six-year limitation period for employment discrimination actions under section 1983 (several decisions instead applied a two-year or a six-month limitation period), and that such precedent did not arise until its decisions in *Perri v. Aytch*, 724 F.2d 362, 368 (3d Cir. 1983) and *Knoll v. Springfield Township School District*, 699 F.2d 137 (3d Cir. 1983), *vacated*, 471 U.S. 288 (1985). *Smith v. City of Pittsburgh*, 764 F.2d at 195.

Whether plaintiffs when they brought their action in 1981 could justifiably have relied on the application of a six-year SOL to § *1981* employment discrimination actions is not clear. The Third Circuit in *Al-Khazraji v. Saint-Francis College*, 784 F.2d 505, 511 (3d Cir. 1986) (citing *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3d Cir. 1977) and *Wilson v. Sharon Steel Corp.*, 549 F.2d 276 (3d Cir. 1977)), *aff'd*, 107 S. Ct. 2022 (1987) found that "[t]his Circuit,

brought their actions in 1981 and 1982, there was no precedent upon which plaintiffs could have relied indicating that a six-year SOL applied to their ERISA discrimination claims.

**III. Conclusion**

These recent decisions highlight the errors committed by the Third Circuit in interpreting ERISA. As the Court is aware, ERISA affects the lives of millions of workers and the business of thousands of corporations. The circuit court below has ruled in a manner that conflicts with a number of Supreme Court decisions and with the rulings of fellow circuits.

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from at least 1977 until 1985, had applied Pennsylvania's six-year statute of limitations in discrimination cases brought under Section 1981." Citing *Smith v. City of Pittsburgh*, the court added that "unlike the state of the law regarding the proper limitations period for Section 1983 actions" precedents in 1978 for § 1981 actions were sufficiently clear that plaintiffs justifiably could expect the six-year statute to apply, *id.* at 513, and that the 1978 changes in the Pennsylvania law did not change that conclusion., *Id.*, n.10. This conclusion appears irreconcilable, however, with the Court's holding in *Smith v. City of Pittsburgh* that "[a]s of [March 1982], this court had not chosen the appropriate Pennsylvania statute of limitations for a claim of unconstitutional termination of employment without due process", 764 F.2d at 195, and its conclusion that plaintiffs could not justifiably have relied on such pre-1978 employment discrimination cases as *Davis v. United States Steel Supply*, 581 F.2d 335, 338 (3d. Cir. 1978) (six-year limit applies to section 1983 claim of unlawful discharge on the basis of race), *cert. denied*, 460 U.S. 1014 (1983) or *Skehan v. City of Bloomsburg State College*, 590 F.2d 470, 477 (3d Cir. 1978) (six-year limit applies to 1983 claim of non-renewal of employment contract), *cert. denied*, 444 U.S. 832 (1979). *Smith v. City of Pittsburgh*, 764 F.2d at 195, n.3. The fact that *Smith* concerned § 1983 actions, whereas *Al-Khazraji* dealt with § 1981 would appear irrelevant in light of the Third Circuit's past policy of determining the SOL applicable to discrimination actions solely on the basis of the underlying claims. *Id.* at 192 (*citing Polite v. Diehl*, 507 F.2d 119, 123 (3d Cir. 1974) (en banc)).

The importance of the issues and the conflict among the circuits combine to demonstrate the need for this Court to affirm the proper role of arbitration and other administrative remedies "at the very heart of the system of industrial self-government" (*USW v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)) as legitimate mechanisms for the resolution of "all of the questions on which the parties disagree" (*id.*), including pension-related disputes, and to define an easily applied statute of limitations for ERISA-based claims.

Respectfully Submitted,

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